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via email, facsimile, and Federal Express

State Water Resources Control Board
901 P Street
Sacramento, CA 95814

Re: Water Transfers Workshop Comments

Honorable Members of the Board:

These comments on the draft "Guide to Water Transfers" are submitted in behalf of the County of Imperial, which has a vital interest in the proposed transfer of water from Imperial Irrigation District to San Diego County Water Authority. We have just learned last week of your workshop this coming Thursday, and regret that we could not have transmitted these comments sooner.

The County's comments are confined to the issues raised in pages 3-8 to 3-10 in respect of defining so-called "third party impacts," "legal users of water," and county of transfer origin impacts.

These issues address the core of concerns by Imperial County government and residents in respect of the proposed exchange, and we urge the State Board to use this opportunity, and its opportunity as responsible agency in the EIS and EIR now being prepared by the U.S. Bureau of Reclamation and Imperial Irrigation District, to ensure that its public interest review will recognize and protect the nonproprietary interests of Imperial County residents.

The limited work to date on the above-cited EIS/EIR shows that the overriding

public concern about this transfer addresses that which the Board characterizes as "third party impacts." One needs only review the transcripts of the six scoping meetings to realize that this is the case -- farmers worried about their economic and environmental future, and farm workers also concerned about their job security. Neither farmers nor farm workers in Imperial County hold a "water right" from this Board; yet their interests are those most threatened by the proposed transfer. The political success of the transfer will be determined by the degree to which all involved in it, including this Board, can respond to these legitimate interests.

As a minimum the State Board in general, and its guide to transfers in particular, must make clear just what the Board believes its jurisdiction to be. The guide admits that the term "legal user of water" needs some defining; yet uses the passive voice in describing what "some" think it may mean. Page 3-9. The State Board's scoping comments on the BuRec/IID EIS/EIR provided equally imprecise guidance on the "scope" of this Board's authority. (Significantly, the U.S. Environmental Protection Agency's scoping comments on the same EIS/EIR called for clarification of the "legal and regulatory context of the proposed water conservation and transfer project.")

The County of Imperial would prefer a determination by this Board that "legal users of water" do not include merely those who hold a water right, but any interested beneficiary of a lawful water use. Such a rule might expand the class of those who could intervene in this Board's proceedings and subsequently seek judicial review, but those administrative concerns must not override the substantive obligation that the Board has toward all California interests who are practically affected by its decisions. Imperial asks that the Board use the guide, and its further participation in the BuRec/IID EIS/EIR, to advance this position.

But as an alternative, if the Board declines to enforce its obligation toward all California interests, the Board should make that position clear so that those interests will know where they stand -- that if they are to seek relief from or conditions on the proposed transfer, they must do so in other arenas.

Related to the question of "legal user," but of potentially broader significance, is the scope of this Board's "public interest" review to address and remove or mitigate so-called "third party impacts." Putting aside for the moment the Katz bill (Water Code section 1810 *et seq.*), the Board needs to clarify to its constituency its jurisdiction to address such impacts. The County understands that attorneys within State service believe the Board has such authority, even when the impacts are to interests that cannot be embraced within the "public trust" or "fish and wildlife." As with "legal user of water," the Board must make clear the scope of its authority, so that those affected will know whether they can look to this Board for relief or must seek that relief in other arenas.¹

Finally, the County of Imperial takes issue with the assertion in the guide that the

1 The Board's draft April 2000 workplan for the IID-SDCWA transfer suggests that the Board can consider the "public interest" in addition to water rights and public trust interests. Page 3, § A.2. The Board must verify that it will make determinations that transcend those of "fish, wildlife, or other instream uses." Page 3, § A.3, ¶ 2.

"agency required to make the findings under Water Code section 1810 is the agency with the water conveyance facility." Page 3-10. One of the findings required for use of excess aqueduct capacity to transfer water determines that use of the conveyance "does not unreasonably affect the overall economy or the environment of the county from which the water is being transferred." Section 1810 does *not* specify that the water conveyance owner make this finding; the statute does not assign that finding to any particular agency. The author of this letter participated in the legislative discussions preceding enactment of section 1810 and recalls that deliberately the legislators did not want to assign the findings in that section. In retrospect that approach may have proven sensible, in that the three required findings address three different sets of interests, with different agencies best equipped to render those findings.

In respect of the finding that assesses the acceptability of impact to the county from which the water is transferred, the County of Imperial believes that for water transferred from Imperial its Board of Supervisors is most popularly accountable and therefore ultimately best equipped to make that finding. Your Board should note that other counties have reached this same conclusion, and as one example Inyo County has provided that a surface or ground water transfer under authority of Water Code section 1810 must be accompanied by a county conditional use permit at which the planning commission (and board of supervisors on appeal) makes the required finding under section 1810. See Inyo County Code, chapter 18.77. (A copy of section 18.77.030 of that code, illuminating county authority and criteria for such findings, is attached for the Board's information.)

In conclusion, the Board is requested to delete the quoted provision from page 3-10 of the draft guide; and in its place provide that section 1810 does not specify the agency to make the findings required by that section, but that counties themselves are best equipped to measure economic and environmental impacts on them, and are in fact now exercising authority in California to make that determination.

The County appreciates this opportunity to participate in the Board's workshop by these means. Regrettably this writer cannot be present because of prior academic commitments at the University of California, Berkeley; but looks forward to the Board's ultimate report of the results of the workshop. Imperial recognizes the difficulty and importance of the Board's task in securing environmentally and politically acceptable water transfers in California and endeavors now and in the future to assist in that task.

Respectfully submitted,

Special Counsel to the County of Imperial

cc: (See next page)

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